No. 89- 952

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES STEEL CORPORATION PLAN FOR EMPLOYEE INSURANCE BENEFITS, USX CORPORATION, as plan sponsor; UNITED STATES STEEL AND CARNEGIE PENSION FUND, plan administrator; and UNITED STATES STEEL INSURANCE BENEFIT TRUST FUND,

Petitioners,

v.

GLENN MUSISKO AND ALL OTHERS SIMILARLY SITUATED to Glenn Musisko, and THE HONORABLE SILVESTRI SILVESTRI in his official capacity as Judge of the Court of Common Pleas of Allegheny County, Pennsylvania,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF AMICUS CURIAE COLT INDUSTRIES INC IN SUPPORT OF THE POSITION OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Colt Industries Inc ("Colt") respectfully moves the Court for leave to file a brief *amicus curiae* in support of the position of Petitioners United States Steel Corporation Plan for Employee Insurance Benefits, USX Corporation, United States Steel and Carnegie Pension Fund, and United States Steel Insurance Benefit Trust Fund.

Colt has an interest in this case because Colt is presently litigating a case that perhaps more dramatically demonstrates how imperative it is that injunctive relief be available to enforce ERISA's comprehensive and explicit preemption and jurisdictional provisions. Colt is a party in the action styled *Nobers v. Crucible, Inc.*, Civil No. 843-1984 (Ct. of Common Pleas of Beaver County, Pa.). *Nobers* clearly demonstrates the egregious harm that can occur when the lower federal courts, contrary to the Congressional intent embodied in ERISA, refuse to grant injunctive relief to prevent or redress violations of ERISA in the state courts.

The *Nobers* plaintiffs are a group of former salaried employees of Crucible, Inc. ("Crucible"),[1] who had been promoted from previous positions in the collective bargaining unit. When their plant closed, plaintiffs were laid off, terminated, and, upon their application, granted benefits applicable to salaried employees. The essence of plaintiffs' claims is that they should have been discharged from the bargaining unit, rather than being discharged from their positions as salaried employees, so that they could receive benefits applicable to bargaining unit employees. Plaintiffs seek damages equivalent to bargaining unit benefits. In a previous action, the federal district court found

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[1] Crucible was a wholly-owned subsidiary of Colt at the time the alleged claims against Colt and Crucible arose. Crucible is now reorganized under the name Colt Industries Operating Corporation ("CIOC"). CIOC is also a wholly-owned subsidiary of Colt.

that plaintiffs had no such right under the collective bargaining agreement, and dismissed plaintiffs' claim for benefits against the trustee of the benefit plans under ERISA, for failure to join the applicable benefit plans, and failure to exhaust administrative remedies.

It is plain that the claims and remedies now alleged in state court by plaintiffs against their former employer, and the employer's sole shareholder, are substantively encompassed by § 510 of ERISA, 29 U.S.C. § 1140, which prohibits activity undertaken "for the purpose of interfering with the attainment of any right to which such participant may become entitled under [an ERISA] plan". This is precisely what plaintiffs allege. Their claims are thus subject to the exclusive jurisdiction of the federal courts under § 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1).

However, defendants have been stymied in their efforts to compel the exercise of the exclusive jurisdiction of the federal courts. As discussed in the attached brief *amicus curiae*, defendants have twice removed to federal court, and now, for the second time, interested persons are seeking an injunction against the state court proceedings. Colt wishes in the attached brief *amicus curiae* to bring before the Court its experience in seeking to enforce the clear mandate of ERISA for exclusive jurisdiction of such claims in the federal courts and the exclusive application of ERISA as the substantive law of decision, in order to make clear the significant implications of *Musisko*.

Colt seeks to demonstrate that the implications of *Musisko* extend far beyond its facts, and that complex, idiosyncratic, and unnecessary problems now being created in *Nobers* and in a number of other actions in this area, including, *inter alia*, *Income Security Corp. v. Louisiana Oilfield Contractors Ass'n*, No. 88-4450 (5th Cir. Mar. 22, 1989), *petition for cert. filed*, 58 U.S.L.W. 3009 (U.S. June 26, 1989), *Solicitor General invited to file brief*, 58 U.S.L.W. 3212 (U.S. Oct. 2, 1989), will be very difficult to resolve unless injunctive relief, which provides an avenue

for substantive appellate review as well as enforcement, is available to effectuate ERISA's comprehensive scheme of preemption and jurisdiction in cases such as *Nobers*. If *Musisko* is correct and it is impossible to obtain injunctive relief under ERISA against state court actions that violate ERISA, then an ERISA-covered employee benefit plan and its sponsor (such as Colt's former subsidiary, Crucible), can be left entirely helpless to enforce the ERISA requirement of exclusive jurisdiction of the federal courts and exclusive substantive application of ERISA—a result so clearly contrary to Congressional intent as to demonstrate the error of *Musisko*.

Undersigned counsel for Colt has attempted to obtain consent to the filing of this brief pursuant to Supreme Court Rule 37.2. Counsel for Petitioners have given such consent but counsel for Respondents have indicated that they do not consent. Counsel for Respondents have informed Colt that the principal basis of their refusal is their belief that the facts of *Nobers* argue even more strongly that injunctive relief ought to be available than the facts of *Musisko*, since the claims in *Nobers* are subject to exclusive federal jurisdiction under ERISA.

WHEREFORE, Colt moves this Court to allow the filing the "Brief Of Amicus Curiae Colt Industries, Inc. In Support Of The Position Of Petitioners United States Steel Corporation Plan For Employee Insurance Benefits, USX Corporation, United States Steel and Carnegie Pension Fund, and United States Steel Insurance Benefit Trust Fund", which is submitted herein with the requisite number of printed copies.

Respectfully submitted,

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No. 89-952

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UNITED STATES STEEL CORPORATION PLAN FOR EMPLOYEE INSURANCE BENEFITS, USX CORPORATION, as plan sponsor; UNITED STATES STEEL AND CARNEGIE PENSION FUND, plan administrator; and UNITED STATES STEEL INSURANCE BENEFIT TRUST FUND,

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Interest of Amicus Curiae Colt Industries Inc

The interest of *Amicus Curiae* Colt Industries Inc ("Colt") is described in the preceding Motion For Leave To File Brief As *Amicus Curiae.*

SUMMARY OF ARGUMENT

In actions involving benefit plans to which ERISA applies, or persons making claims pertaining to such benefit plans, ERISA provides that specified parties are empowered to bring specified claims against specified persons in specified forums. ERISA preempts all substantive state laws encompassed in its boundaries, and contains a very precise structure for the prosecution of preempted claims. Congressional intent to create a uniform body of federal law is clearly embodied in ERISA.

The lower courts are experiencing great difficulty in the application of these fundamental ERISA principles. There are repeated examples of supposed state law claims, substantively preempted by ERISA, which are nevertheless forced into state courts to be adjudicated under nonexistent state law, because the lower federal courts have incorrectly remanded for lack of jurisdiction and/or improvident removal, an error not readily subject to review. Injunctive relief against unauthorized state court proceedings is not only permissible in this context under the Anti-Injunction Act, 28 U.S.C. § 2283, as well as the holding of this Court in *Porter v. Dicken*, 328 U.S. 252 (1946) (cited in *Mitchum v. Foster*, 407 U.S. 225, 235 n.17 (1972)), but must be available to give effect to ERISA's comprehensive preemption and enforcement scheme and assist the resolution of these difficult issues.

The ERISA-preempted claim in *Musisko* is subject to the concurrent jurisdiction of the state courts under § 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1), but must be asserted against the plan consistent with ERISA's enforcement provisions. Injunctive relief must be available to ensure that ERISA is properly applied in *Musisko*.

The problem comes into sharper focus when considered in the context of claims which are subject to the exclusive jurisdiction of the federal courts under ERISA. With the exception of claims for benefits which are autho-

rized under § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), all claims preempted by ERISA are subject to the exclusive jurisdiction of the federal courts by virtue of § 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1). Although removal is theoretically available, it has not in practice proven to be an effective solution, in part because of the unreviewability of erroneous orders of remand, and in part because the lower federal courts continue to apply the well-pleaded complaint doctrine despite the holdings of this Court in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 66 (1987) and *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). Problems can only multiply if the only effective avenue for enforcing ERISA's preemption and jurisdictional scheme is foreclosed due to erroneous analyses such as those contained in *Musisko*, and in *Income Security Corp. v. Louisiana Oilfield Contractors Ass'n*, No. 88-4450 (5th Cir. Mar. 22, 1989), *petition for cert. filed*, 58 U.S.L.W. 3009 (U.S. June 26, 1989), *Solicitor General invited to file brief*, 58 U.S.L.W. 3212 (U.S. Oct. 2, 1989).

Certiorari must be granted to resolve the issue presented in *Musisko*, provide guidance to the courts, and provide an avenue for effective enforcement of ERISA's scheme of preemption and jurisdiction.

ARGUMENT

I. The Holding Of The Third Circuit Court May Foreclose The Only Avenue For Effective Enforcement Of ERISA's Preemption And Jurisdictional Scheme

This brief *amicus curiae* is filed to make the Court aware of the wide ramifications of the decision in *Musisko*, which go far beyond the factual situation presented there. While the error of the court below in *Musisko* can be demonstrated on the facts of that case, as petitioners have done in their petition for a writ of certiorari, the error can be seen even more clearly and more startlingly in cases such as the *Nobers* litigation, described more fully below,

to which Colt is a party. It is therefore of benefit to the Court in its consideration of *Musisko* to appreciate how seriously the decision below hamstrings all those who sponsor and administer ERISA-covered employee benefit plans and permits egregious violations of ERISA to go unredressed.

While *Musisko* involves a cause of action under ERISA of which the state and federal courts have concurrent jurisdiction (namely, a claim for benefits by a plan participant), *Nobers* involves a cause of action under ERISA of which the federal courts have exclusive jurisdiction. If *Musisko* is correct and it is impossible to obtain injunctive relief under ERISA against state court actions that violate ERISA, then an ERISA-covered employee benefit plan and its sponsor (such as Colt's former subsidiary, Crucible, Inc. ("Crucible")), can be left entirely helpless to enforce the ERISA requirement of exclusive jurisdiction of the federal courts and exclusive substantive application of ERISA—a result so clearly contrary to Congressional intent as to demonstrate the error of *Musisko*.

A. ERISA Provides Specified Forums And Remedies For Encompassed Claims, Consistent With Congressional Intent To Uniformly And Comprehensively Regulate The Employee Benefit Field

Section 514(a) of ERISA, 29 U.S.C. § 1144(a), provides that ERISA "shall supersede any and all State laws". Congress intended to provide a uniform body of law in this area.[1] ERISA's preemptive force has been repeatedly rec-

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[1] It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or

ognized by this Court.[2] The substantive provisions of ERISA dictate the nature of the state remedies preempted by it.[3]

As to jurisdiction to entertain claims preempted by ERISA, § 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1), is lucid and specific. It provides (emphasis added):

> Except for actions under subsection (a)(1)(B) of this section [authorizing claims by participants and beneficiaries to recover benefits from ERISA plans], the district courts of the United States shall have *exclusive* jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have *concurrent* jurisdiction of actions under subsection (a)(1)(B) of this section.

ERISA's jurisdictional scheme was carefully crafted by Congress.[4] The federal courts have original jurisdiction

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any instrumentality thereof, which have the force or effect of law.

Joint Explanatory Statement of the Committee of Conference, 120 Cong. Rec. 29,774, 29,933 (daily ed. Aug. 22, 1974), *reprinted in* III Legislative History of the Employee Retirement Income Security Act of 1974, at 4745-46 (1976) ["Legislative History"].

[2] *E.g.*, *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 66 (1987); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987); *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985); *Shaw v. Delta Air Lines*, 463 U.S. 85, 98 (1983); *Alessi v. Raybestos-Manhattan*, 451 U.S. 504, 523 (1981).

[3] The difficulties apparent in this area arise in part because, unlike many other federal statutes, ERISA preempts, and to some extent co-exists with, certain well-rooted traditional causes of action.

[4] The legislative history of ERISA confirms the careful manner in which this jurisdictional scheme was devised. In early legislative drafts, state and federal courts were granted concurrent jurisdiction over all civil actions brought by a participant or beneficiary.

over *all* ERISA claims, including claims for benefits. The state courts have concurrent jurisdiction, *only* of claims for benefits. A claim within the ambit of ERISA, other than a direct claim for benefits, may be heard only in federal court.

The distinction is of critical importance. Claims for benefits, over which the state courts have concurrent jurisdiction, may only be asserted against, and under the terms of, an ERISA plan. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). ERISA plans are the only entities with liability for benefits due under their terms. ERISA § 502(d)(2), 29 U.S.C. § 1132(d)(2). Benefits promised under the terms of an ERISA plan do not create direct employer liability.

Claims substantively encompassed by § 510 of ERISA, 29 U.S.C. § 1140,[5] are among the most significant of those

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E.g., H.R. 2, 93d Cong., 1st Sess. § 106(g) (1973), S. 4, 93d Cong., 1st Sess. § 604, *both reprinted in* I Legislative History, at 34, 184. Subsequent amendments sharply limited the jurisdiction of state courts to actions involving direct claims for benefits. ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1). The Joint Explanatory Statement of the Committee of Conference elucidates:

> In addition to being able to request the Secretary of Labor to bring suit on their behalf in cases where benefits are denied in violation of the act [i.e., in violation of § 510 of ERISA], individual participants and beneficiaries will also be able to bring suit in Federal court in such instances, as well as to obtain redress of fiduciary violations. In addition, participants and beneficiaries may bring suit to recover benefits denied contrary to the terms of their plan, and where such claims by participants or beneficiaries do not involve application of the substantive requirements of this legislation, they may be brought in either State or Federal courts of competent jurisdiction.

120 Cong. Rec. 29,774, 29,933 (daily ed. Aug. 22, 1974), *reprinted in* III Legislative History, at 4745.

[5] Though § 510 and other substantive provisions dictate the substantive nature of preemption, § 514(a) of ERISA, 29 U.S.C.

over which the federal courts are to exercise exclusive jurisdiction.[6] Section 510 prohibits activity undertaken "for the purpose of interfering with the attainment of any right to which such participant may become entitled under [an ERISA] plan". A supposed state law claim which seeks damages equivalent to benefits, based on an alleged wrongful act by an employer or plan sponsor designed to interfere with rights to receive benefits, is encompassed by § 510; any and all applicable state laws are preempted. Although damages resulting from claims encompassed by § 510 may be equivalent to benefits denied as a result of the wrongful act, these claims are fundamentally different from direct claims for benefits with respect to (1) the legal theory of liability and recovery; (2) the identity of the liable, or potentially liable, parties;[7] and (3) the concurrent versus exclusive jurisdiction of the federal courts under ERISA.

While § 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1), provides the jurisdictional authority to entertain claims based on ERISA, and other provisions of ERISA provide the substantive basis for claims, it is § 502(a), 29 U.S.C. § 1132(a), that outlines the array of permissible civil enforcement actions. Claims that are substantively encompassed by § 510, for example, may be asserted through the civil enforcement provision of § 502(a)(3), 29 U.S.C. § 1132(a)(3), only in the federal courts as provided by § 502(e)(1), 29 U.S.C. § 1132(e)(1).

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§ 1144(a), is of course the vehicle through which substantive claims are preempted.

[6] Other claims subject to exclusive federal jurisdiction include those encompassed by § 409 of ERISA, 29 U.S.C. § 1109. *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) (holding that § 409 does not authorize private claim against employer for improper or untimely processing of benefit claims).

[7] Thus, the fundamental problem in *Musisko* is that the claims were not asserted against the proper party as dictated by ERISA, nor was the proper law applied.

ERISA's preemption, enforcement, and jurisdictional provisions are meaningless without an avenue for effectively ensuring their application. As the following discussion reveals, the injunctive relief requested by petitioners provides such an avenue.

B. The Lower Federal And State Courts Are Experiencing Difficulty In The Application Of ERISA's Preemption And Jurisdictional Scheme

1. *Removal Has Proven To Be An Inadequate Remedy For State Court Actions That Violate ERISA*

A visceral first reaction is that the possibility of removal to federal court should serve to adequately enforce ERISA. Sadly, experience has proven otherwise. Regardless of error, a remand to state court is not reviewable on appeal. 28 U.S.C. § 1447(d). Review by petition for writ of mandamus is sharply circumscribed. See *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723 (1977); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). Where the district court cites improvident removal or lack of jurisdiction as grounds for remand, mandamus relief is ordinarily unavailable:

> [A]fter *Thermtron* reviewability of § 1447 remands turns on what the district court *says* it is doing. If the court *says* it is remanding for lack of jurisdiction, the decision—even if flagrantly wrong—is completely unreviewable. If the court *says* something else, review is available. In other words, reviewability turns on incantation, and the district court has absolute discretion to permit or to deny review of its order.

Sykes v. Texas Air Corp., 834 F.2d 488, 492 (5th Cir. 1987). *See also Air-Shields, Inc. v. Fullam*, No. 89-1295 (3d Cir. Dec. 7, 1989). This Court's direction to the district courts in *Metropolitan Life*, 481 U.S. at 66-67, to conduct a meaningful substantive analysis if ERISA preemption is the basis

of removal[8] cannot be effectively enforced, because remands for lack of jurisdiction are not reviewable.

A review of the case law in this area swiftly reveals widespread problems. Federal district courts have on a number of occasions refused to accept jurisdiction over properly removed ERISA claims, remanding them instead to state courts which often lack jurisdiction to entertain them. Federal appellate courts have, in turn, refused appellate review.

In *New Orleans Public Service, Inc. v. Majoue*, 802 F.2d 166 (5th Cir. 1986), for example, the Fifth Circuit Court considered an appeal of the district court's refusal to enjoin a state court proceeding which was allegedly substantively encompassed by § 510 of ERISA. The Fifth Circuit Court decreed that the action seeking injunctive relief was, in effect, an impermissible attempt to obtain review of the district court's previous order remanding the action to state court. 802 F.2d at 167. As such, the Fifth Circuit Court held that the district court lacked jurisdiction to entertain the claim for injunctive relief. [9]

Indeed, despite the clear guidance of this Court in *Metropolitan Life*, 481 U.S. at 66-67, and *Pilot Life*, 481 U.S. 41, claims preempted by ERISA, even those subject to exclusive federal jurisdiction, have nevertheless been remanded to state court for lack of jurisdiction. *Whitman v. Raley's, Inc.*, 886 F.2d 1177, 1179 (9th Cir. 1989), involved a claim against a former employer for "'tortious refusal to

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[8] This requirement is especially important for claims subject to *exclusive* federal jurisdiction under ERISA.

[9] Requests for injunctive relief and petitions for mandamus do, as a practical matter, represent two potential responses to the same fundamental problem: that of compelling the courts to recognize and give effect to the preeminence of ERISA. Although removal is generally less disruptive of state court proceedings, injunctive relief must also be available, as it would provide a more certain avenue of appellate review.

pay benefits'". Such a claim must be encompassed by § 510 of ERISA, and was accordingly removed to federal court. However, the district court remanded for lack of jurisdiction, simultaneously noting its own uncertainty and certifying a question of law for appellate review. The Ninth Circuit Court, after discussing the doctrine of "complete preemption", dismissed the appeal on the grounds that orders remanding actions for lack of jurisdiction are unreviewable under *Thermtron*. 886 F.2d at 1181-82. Thus, defendant was compelled to return to state court with no avenue for appeal.[10]

Income Security Corp. v. Louisiana Oilfield Contractors Ass'n, No. 88-4450 (5th Cir. Mar. 22, 1989), *petition for cert. filed*, 58 U.S.L.W. 3009 (U.S. June 26, 1989), *Solicitor General invited to file brief*, 58 U.S.L.W. 3212 (U.S. Oct. 2, 1989), bears consideration. There, the district court granted an injunction against state court proceedings after finding that the action was subject to exclusive federal jurisdiction under ERISA. The Fifth Circuit Court peremptorily vacated, holding that injunctive relief is unavailable even though a claim is subject to exclusive federal jurisdiction.[11] Though the claim in *Income Security Corp.* may not be preempted by ERISA and therefore may

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[10] *See also Hansen v. Blue Cross of California*, ___ F.2d ___, (9th Cir. 1989) (refusing to entertain petition for writ of mandamus of district court order remanding action on grounds that complaint was not facially preempted by ERISA); *but see In re Life Ins. Co. of North America*, 857 F.2d 1190 (8th Cir. 1988) (granting mandamus review of remand of "pendent" state claim preempted by ERISA); *Survival Systems v. United States District Court for the Southern District of California*, 825 F.2d 1416 (9th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988) (denying petition for writ of mandamus after conducting substantive analysis of whether pendent state law claim was preempted by ERISA).

[11] The Fifth Circuit Court based its holding on its previous decision in *Texas Employers Ins. Ass'n v. Jackson*, 862 F.2d 491 (5th Cir. 1988), *cert. denied*, 109 S.Ct. 1932 (1989).

not be subject to exclusive federal jurisdiction so that an injunction is unjustified on the merits,[12] the rationale of the Fifth Circuit Court—a blanket proscription of injunctions—is not the proper solution.[13]

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[12] *Income Security Corp.* involved claims brought in state court against a Mr. Felton, who had been retained by an ERISA plan to act as its actuary, and who had also processed claims for the plan, subject to the approval of the plan's trustees. *See* Respondents' Brief in Opposition to the Petition for Certiorari in *Income Security Corp.*, at 3, 16. Mr. Felton argued successfully in the district court that he was a fiduciary under the provisions of ERISA, and that the claims against him were therefore preempted by ERISA and subject to the exclusive jurisdiction of the federal courts. Actions against fiduciaries are indeed encompassed by § 409 of ERISA, 29 U.S.C. § 1109, and subject to exclusive federal jurisdiction. But people who provide actuarial and claims-processing services to an ERISA plan are not necessarily ERISA fiduciaries; they may lack the discretionary authority to earn the title of "fiduciary". The plan may indeed bring claims against them in state court; such state law claims are not preempted by ERISA.

[13] Similar problems have arisen under the federal labor statutes. This Court has held that ERISA's preemptive scope is so broad as to be singularly equivalent to that of federal labor laws. *See Metropolitan Life*, 481 U.S. at 66 (actions brought under ERISA § 502(a) fall under rule established in *Avco Corp. v. Machinists*, 390 U.S. 557 (1968) for actions preempted by § 301 of the LMRA, 29 U.S.C. § 185). *Texas Employers Ins. Ass'n v. Jackson*, 618 F. Supp. 1316 (E.D. Tex. 1985), involved an action for declaratory and injunctive relief against a state court action preempted by the Longshore and Harbor Workers' Compensation Act ("LHWCA"). Like claims under § 510 of ERISA, 29 U.S.C. § 1140, claims under the LHWCA are subject to the exclusive jurisdiction of the federal courts. *See* 33 U.S.C. §§ 918 & 921(d). The district court accordingly issued an injunction against the state court proceedings. The Fifth Circuit Court reversed, holding that the Anti-Injunction Act barred such injunctive relief. *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491, 504 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 1932 (1989).

Review of remand orders has also been an issue in the labor law area. *See In re Carter*, 618 F.2d 1093 (5th Cir. 1980), *cert. denied sub nom., Sheet Metal Workers' Intern. Ass'n, AFL-CIO v. Carter*, 450

2. *Nobers Graphically Demonstrates The Inadequacy Of Removal And The Need For Injunctive Relief As Authorized By ERISA*

Nobers v. Crucible, Inc., Civil No. 843-1984 (Ct. of Common Pleas of Beaver County, Pa.), is illustrative of the tangled web confronting defendants.[14] The *Nobers* plaintiffs are former salaried employees of defendant Crucible who were laid off and terminated from their employment as a result of a plant closing. Each of the *Nobers* plaintiffs had been promoted to salaried positions from previous positions in the collective bargaining unit. Upon termination, plaintiffs received benefits applicable to salaried employees.

In 1982, the *Nobers* plaintiffs filed an action in federal court, based on § 301 of The Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, as well as § 502 of ERISA. In their LMRA claims, plaintiffs alleged that the collective bargaining agreement granted them a right to be returned

U.S. 949 (1981) (enforcing exclusive jurisdiction under § 301 of the LMRA); *Kunzi v. Pan American World Airways*, 833 F.2d 1291 (9th Cir. 1987) (Railway Labor Act).

[14] *Schmitt v. Insurance Co. of North America*, 845 F.2d 1546 (9th Cir. 1988), demonstrates an additional difficulty that plagues defendants in state court actions preempted by ERISA: that of inadvertently acquiescing to state court proceedings. There, defendant was obliged to participate in pre-trial proceedings before it became evident that so-called "Doe" co-defendants were non-existent, clearing the way for defendant to remove to federal court. *See* 845 F.2d at 1548. Defendant removed the following day. 845 F.2d at 1547. The district court remanded to state court on the grounds that removal was improvident, and that defendant had waived its right to removal by participating in the state court action. 845 F.2d at 1548. The Ninth Circuit Court held that the district court's order was "not reviewable by appeal or otherwise". 845 F.2d at 1551. Thus, a defendant in a state court action preempted by ERISA is compelled to resist the jurisdiction of the state courts at every turn, or risk being deemed to have "waived" the issues of ERISA preemption and exclusive federal jurisdiction.

by Crucible to, and be terminated from, the bargaining unit rather than be laid-off and ultimately terminated as salaried employees, and that Crucible's failure to exercise its power to return plaintiffs to the bargaining unit had prevented them from attaining eligibility to obtain benefits applicable to bargaining unit employees. The plaintiffs claimed the union had not properly represented them. The complaint contained an apparent state law claim for damages against Colt, the sole shareholder of Crucible. The court granted summary judgment on the LMRA claims,[15] finding that plaintiffs had no right to return to the bargaining unit under the collective bargaining agreement, nor were such rights created by any alleged "past practice". The Third Circuit Court affirmed without opinion. *Nobers v. Crucible, Inc.*, 722 F.2d 733 (3d Cir. 1983).

On June 28, 1984, plaintiffs filed an action in the Court of Common Pleas of Beaver County, Pennsylvania against Crucible and Colt, Crucible's sole shareholder, asserting claims for breach of, and interference with, express and implied contracts of employment. *Nobers v. Crucible, Inc.*, Civil No. 843-1984 (Ct. of Common Pleas of Beaver County, Pa.). According to plaintiffs, these alleged contracts entitled them to be singled out from other salaried employees by reason of their prior membership in the bargaining unit, and returned to, and terminated from, the bargaining unit rather than being terminated as salaried employees. Plaintiffs sought relief in the form of damages equivalent to unemployment, pension, and insurance benefits applicable to bargaining unit employees. Plaintiffs made no claim for lost wages, in tacit acknowledgment that the sole consequence of the wrong allegedly suffered was its alleged effect on benefit eligibility.

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[15] The district court dismissed plaintiffs' ERISA claim for failure to join applicable benefits plans, and failure to exhaust administrative remedies. Plaintiffs did not appeal the dismissal.

It could not be plainer that plaintiffs' claims against their former employer, and the employer's sole shareholder, are encompassed by § 510 of ERISA, 29 U.S.C. § 1140. Section 510 specifically encompasses claims for interference with rights to obtain benefits. *See Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1216 (8th Cir.), *cert. denied*, 454 U.S. 968, and *cert. denied sub nom, Dependahl v. Kalmanovitz*, 454 U.S. 1084 (1981); *see also Gavalik v. Continental Can Co.*, 812 F.2d 834, 860 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987). Not only does § 510 provide the exclusive remedy for plaintiffs' claims, but Congress has mandated that the federal courts are to exercise exclusive jurisdiction over claims encompassed by § 510. ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

Within 30 days of receipt of the complaint, defendants removed to federal court. On plaintiffs' motion, the district court, notwithstanding defendants' demonstration of the applicability of § 510, remanded the action on the grounds that ERISA preemption was not established by the "face of the complaint". *Nobers v. Crucible, Inc.*, 602 F. Supp. 703, 708 (W.D. Pa. 1985). There existed at that time a split of authority on the issue of whether supposed state law claims not explicitly invoking ERISA could be removed to federal court. *See Metropolitan Life*, 481 U.S. at 62 n.2. The remand was not subject to appellate review. *See Thermtron*, 423 U.S. 336.

After remand, defendants requested an injunction from the district court, an approach suggested by the district court in its decision remanding the action. *See Nobers*, 602 F. Supp. at 708-09. Injunctive relief was denied. *Nobers v. Crucible, Inc.*, Civil No. 85-563 (W.D. Pa. 1985), *aff'd without opinion*, 787 F.2d 581 (3d Cir. 1986) (holding, largely on a facial review of the complaint, that defendants had failed to make a "strong and unequivocal showing" of relitigation).

This Court's decisions in *Metropolitan Life* and *Pilot Life* followed.[16] On defendants' motion, the Court of Common Pleas dismissed the action on the grounds that it is preempted by ERISA. On appeal, the Superior Court of Pennsylvania ignored *Metropolitan Life* and *Pilot Life*, instead relying on *Shaw v. Westinghouse*, 276 Pa. Super. 220, 419 A.2d 175 (1980),[17] to hold that plaintiffs' claims are not preempted by ERISA even though the relief sought is to obtain damages equivalent to benefits. *Nobers v. Crucible, Inc.*, 376 Pa. Super. 156, 545 A.2d 367 (1988). The Superior Court would thus create a state law cause of action analogous in effect and operation to § 510 of ERISA. *See also McClendon v. Ingersoll-Rand Co.*, ____ Tex. ____, 779 S.W. 2d 69 (1989) (creating state law cause of action analogous to § 510). Congress clearly intended to preempt any such state law causes of action. Nevertheless, the Supreme Court of Pennsylvania denied review. ____ Pa. ____, 559 A.2d 39 (1989). The action was thus returned to the Court of Common Pleas with implicit instructions to do the impossible: assert jurisdiction and apply state law to claims which are subject to exclusive federal jurisdiction and preempted by federal law.

Within 30 days of return to the Court of Common Pleas, defendants filed a renewed notice of removal. The district court granted plaintiffs' motion to remand the action, on the grounds that the renewed notice was filed

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[16] These decisions unequivocally establish that the "face of the complaint" analysis applied by the district court to remand, as well as to deny injunctive relief, is inappropriate in the context of ERISA preemption.

[17] Because the alleged breach of contract at issue in *Shaw* occurred in 1972, ERISA was inapplicable to *Shaw*. See ERISA § 514(a) & (b)(1), 29 U.S.C. § 1144(a) & (b)(1).

more than 30 days after *Metropolitan Life* and *Pilot Life* issued.[18]

Thus, defendants are caught between a federal district court and a state appellate court, both refusing to give effect to ERISA's broad preemptive scope. Although both the district court and the Superior Court have recognized that plaintiffs' claims against at least Colt are in the nature of § 510 claims,[19] neither one is willing to give effect to ERISA preemption and concommitant exclusive federal jurisdiction. Defendants' dilemma illustrates that there must be some avenue for ensuring that ERISA is applied, and that the exclusive jurisdiction of the federal courts is protected. Exclusive jurisdiction is a Congressional mandate, not to be ignored.

C. The Anti-Injunction Act Permits Injunctive Relief To Enforce ERISA's Preemption And Jurisdictional Scheme

In its opinion in *Musisko*, the Third Circuit Court held that the injunction issued by the district court did not fall within the statutory exceptions of the Anti-Injunction Act, 28 U.S.C. § 2283. These exceptions permit an injunction of state court proceedings if expressly authorized by Con-

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[18] In using the issuance of this Court's decisions as a benchmark for the commencement of a 30-day period for removal, the district court imposed its own extra-statutory requirement. See 28 U.S.C. § 1446(b). Hence, defendants shall file a petition for writ of mandamus to seek relief from the district court's order of remand. *See Thermtron*, 423 U.S. 336. Furthermore, the salaried benefit plans have now filed a second complaint for injunctive relief, the determination of which may turn on this Court's resolution of the Third Circuit Court's opinion in *Musisko*.

[19] *See Nobers*, 602 F. Supp. at 707 (plaintiffs' *only* colorable claim against Colt is "a tort action . . . possibly for inducing breach of contract or interference with contractual relations"); *Nobers*, 545 A.2d at 369 (claim against Colt is "for tortious interference of the plaintiffs' contract with . . . Colt's subsidiary").

gress, or necessary in aid of the federal court's jurisdiction, or necessary to protect or effectuate the federal court's judgment. Significantly, the test is disjunctive. Equally significant, certain ERISA preempted actions for which injunctive relief has been denied meet all three of the articulated criteria.

With respect to the first prong of the Anti-Injunction Act test, this Court has noted that "a federal law need not expressly authorize an injunction of a state court proceeding in order to qualify as an exception". *Mitchum v. Foster*, 407 U.S. 225, 237 (1972). ERISA's provisions for preemption and jurisdiction, and the underlying Congressional intent to broadly preempt and regulate this field implicitly yet clearly authorize injunctions of state court proceedings. More explicit guidance is unnecessary. Indeed, in *Porter v. Dicken*, 328 U.S. 252 (1946) (cited in *Mitchum*, 407 U.S. at 235 n.17)), this Court held that a statute granting authority to enjoin acts violating or threatening a violation of the statute was sufficiently broad to authorize injunctions of state court proceedings. The statute, the Emergency Price Control Act of 1942, 56 Stat. 33, provided:

> Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices.

Similarly, § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), provides that a civil action may be brought:

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter[20] or the terms of the plan, or (B) to

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[20] The term "subchapter" in § 502(a)(3) encompasses all of Title I of ERISA, *see* H.R. Rep. No. 1280, 93d Cong., 2d Sess., at 75 (1974), *reprinted in* III Legislative History, at 4350, and therefore includes such substantive provisions as § 510, 29 U.S.C. § 1140.

obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

Certainly, § 502(a)(3), when viewed in the overall context of ERISA, is sufficiently broad to authorize injunctive relief on behalf of an ERISA fiduciary who is seeking to enforce ERISA's preemptive and jurisdictional provisions, just as the Price Administrator was authorized by the Emergency Price Control Act to seek injunctive relief in federal court.[21] Fiduciaries must be able to apply to federal court to enjoin state court proceedings which threaten the integrity of ERISA.

The second prong of § 2283 recognizes that federal courts must be able to exercise injunctive powers in aid of their jurisdiction. State court jurisdiction under ERISA is of a very limited and specific nature; it is confined to claims for benefits properly asserted against an ERISA plan. The state court in *Musisko* exceeded the authority extended to it under ERISA, and thus the decision of the Third Circuit Court must be reversed to give effect to the Congressional intent embodied in ERISA's comprehensive preemption and jurisdictional scheme. This issue is even more sharply focused for claims of which the federal courts are granted exclusive jurisdiction by § 502(e)(1) of ERISA. 29 U.S.C. § 1132(e)(1).

Indeed, § 510 itself contains a statement that it may be enforced through § 502. 29 U.S.C. § 1132.

[21] This Court reasoned in *Porter*, 328 U.S. at 252, that:

> [Section] 205 authorizes the Price Administrator to bring injunction proceedings to enforce the Act in either state or federal courts, and this authority is broad enough to justify an injunction to restrain state court evictions . . . . Since the provisions of the Price Control Act, enacted long after [the Anti-Injunction Act], do not compel the Administrator to go into the state courts but leave him free to seek relief in the federal courts, he was not barred by [the Anti-Injunction Act] from seeking an injunction to restrain an unlawful eviction.

Yet the Third Circuit Court in *Musisko*, and the Fifth Circuit Court in *Income Security Corp.*[22] and *Majoue*, have held that injunctive relief is unavailable to protect federal jurisdiction of claims preempted by ERISA.[23] These blanket prohibitions are not only incorrect, but they are in conflict with *Gilbert v. Burlington Indus.*, 765 F.2d 320 (2d Cir. 1985); *aff'd mem sub nom. Roberts v. Burlington Indus.*, 477 U.S. 901 (1986); *General Motors Corp. v. Buha*, 623 F.2d 455 (6th Cir. 1980); *Marshall v. Chase Manhattan Bank*, 558 F.2d 680 (2d Cir. 1977).

Finally, under the third prong of the Anti-Injunction Act test, the federal courts have injunctive power to protect or effectuate their judgments. This concern is implicated in *Nobers*. Civil No. 843-1984 (Ct. of Common Pleas of Beaver County, Pa.). The *Nobers* plaintiffs began their journey with a claim for benefits,[24] which was dismissed by the district court. Defendants have argued in the district court, the Third Circuit Court, and the state courts, that the subsequent action filed in the Court of Common Pleas is merely a relitigation of the claim for benefits dismissed by the district court. The district court itself indicated, in its first opinion remanding the action,

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[22] The Solicitor General, in his brief filed in response to this Court's invitation in *Income Security Corp.*, argued that injunctive relief should not be available, no doubt because the claims in that case are not preempted by ERISA in the first instance, and cannot implicate such crucial issues as the exclusive jurisdiction of the federal courts. It is clear that injunctive relief is entirely inappropriate if the state court action is not preempted by ERISA, as appears to be the case in *Income Security Corp.*

[23] The Ninth Circuit Court in *Whitman*, 886 F.2d 1177, and *Hansen*, ___ F.2d. ___, has steadfastly refused to grant mandamus relief for actions erroneously remanded to state court, despite ERISA preemption. *But see In re Life Ins. Co. of North America*, 857 F.2d 1190 (8th Cir. 1988).

[24] In the same initial action, plaintiffs' claims under the LMRA were denied on a motion for summary judgment.

that res judicata might constitute a bar to plaintiffs' claims. Nevertheless, the district court subsequently applied a "face of the complaint" analysis to deny injunctive relief.

The sound and well-known principles underlying the doctrine of res judicata are of heightened importance, because of the broad preemption and specific jurisdictional provisions set forth in ERISA. As *amicus curiae* has demonstrated, these ERISA provisions are meaningless unless injunctive relief is available.

CONCLUSION

For the reasons stated above, the Court should grant Petitioners' petition for writ of certiorari and reverse the decision of the court below.

Respectfully submitted,

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